United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2059

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

SAMUEL ALLEN, RAYMOND HARDRICK
and MELVIN LEMMONS,

Petitioners,

-against-

77 - 2059

COUNTY COURT, ULSTER COUNTY,
NEW YORK, WOODBOURNE CORRECTIONAL
FACILITY, WOODBOURNE, NEW YORK,

Respondents.

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BRIEF FOR PETITIONER-APPELLEES

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Petitioners-Appellees
Allen, Hardrick and Lemmons
401 Broadway Suite 306
New York, N. Y. 10013
212/925-2105

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MICHAEL YOUNG, ESQ.
Of Counsel

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BRIEF FOR PETITIONERS-APPELLEES

PRELIMINARY STATEMENT

The respondents below bring this appeal from an order of the United States District Court for the Southern District of New York, dated April 28, 1977 (Owen, J.) granting petitioners' application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The District Court's opinion of April 19, 1977 is set forth in appellant's appendix at A2.

STATEMENT OF FACTS

On March 28, 1973, petitioners-appellees (hereafter "petitioners") and one "Jane Doe", a juvenile co-defendant, were riding in an automobile on the New York State Thruway (A172).[1] Petitioner Lemmons was driving, with "Jane Doe" sitting in the right front seat; petitioners

1. References are to the appendix in the State Court of Appeals which is included as document 2 of the record on appeal to this Court.

Allen and Hardrick were in the back seat (A192). When the car was stopped for a speeding violation,[2] one of the officers approached the right (passenger) side of the vehicle (A192). Looking through the right front window, he could see Doe's handbag lying on the floor of the vehicle between Doe's right leg and the car door next to her (A192,213,204-5). Protruding from the top of the bag was the handle of a gun. A search of the bag disclosed a second gun and various documents belonging to Doe. When questioned by the officers, Doe admitted that the handbag was hers (A205).

A. THE TRIAL

Petitioners Lemmons, Allen and Hardrick, together with Doe, were subsequently all charged, tried and convicted of possession of these two guns.[3] In seeking petitioners' conviction on the gun possession charges, the State relied on the statutory presumption of possession set forth in New York Penal Law §265.15(3):

> The presence in an automobile ... of any firearm ... is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon ... is found ...

2. When the officers called in Lemmons' driver's license identification, they were advised that he was wanted on a fugitive warrant from Michigan, and he was arrested by the officers on that basis. It was later learned that the information concerning a fugitive warrant was inaccurate, and that there was no such warrant for Lemmons at the time of his arrest.

3. Petitioners and Doe were also charged, tried and acquitted for possession of drugs and a gun allegedly found in the trunk of the car in which they were riding.

Thus, except for the evidence that the guns were found inside Doe's purse in the car in which petitioners and Doe were riding, the State introduced no evidence that any of the petitioners had actual or constructive possession or even knowledge of the existence of the guns. Consequently, as the State conceded at oral argument before the district court,[4] the only basis for petitioners' convictions was the statutory presumption.

At the close of the State's case, the petitioners moved to dismiss the gun charges, claiming that the presumption could not properly apply to them and that there was therefore no evidence on which the jury could return a guilty verdict.[5] The trial court denied petit-

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4. See district court opinion at 2 (set forth in appellant's appendix at A3)

5. MR. KLEIN: On behalf of the defendant Melvin Lemmons I join in the general motion to dismiss this case on the grounds that as to him the People have failed to make out a prima facie case, and more specifically ...[t]he only time the presumption of being in an automobile applies to all of the occupants of the car is negated is by certain exceptions such as where the weapon is found upon the person of one of the other occupants of the car. In this case the proof adduced by the Prosecution is that ... the weapons are found on the person of one of the other parties in a handbag belonging to one of those other parties. I see no way, with all due respect, to extend the presumption in a case like that to this defendant, and I respectfully ask that count one of the indictment be dismissed as to the defendant Lemmons.

THE COURT: He is saying that the only proof you have again is your presumption; right?

MISS DONOVAN: [the prosecution] Correct.

THE COURT: He was in the car, and the statute presumes. You have no other proof?

MISS DONOVAN: Right.

THE COURT: The guns were in the car. Denied. Denied. * * *

MR. TORRACA: Your Honor, on behalf of the defendants Hardrick and Allen I likewise join in the previous motions made by my two colleagues on behalf of Lemmons and/or Marcella Murphy. In addition, to wit: I move this court to dismiss count three involving the .45 automatic pistol and count four

[footnote #5 continued]

ioners' motion and, in thereafter charging the jury that it could convict all of the petitioners and Doe on the basis of the statutory

[footnote #5 continued]
involving the .38 caliber revolver, that there is no proof in the record that the defendants Hardrick and Allen were in possession of these particular weapons. The weapons at all times were on the person of another subject in the vehicle.

THE COURT: My recollection of the testimony is that they were in her purse.

MR. KLEIN: Well, the purse being part of the person, Your Honor, similar-

THE COURT: I am aware of that. In other words, you are contending that if I carry a satchel around, it is part of my person? If I put it on the floor, it is still part of my person; is that correct?

MR. TORRACA: If you put it on the floor of the car, it is somewhat different, but if it is in a pocketbook belonging to a person, it is not in the car itself.

THE COURT: That is your interpretation; right?

MR. TORRACA: Right, yes, sir.

THE COURT: Based upon that you say they have not proved even with the presumption that your clients were in possession of any handguns?

MR. TORRACA: Well, not only with the presumption, there is no proof in the case at all.

THE COURT: So I thought there was proof, one, there was a car, that there were four people in the car, that they found two guns in the car, I think that is proof of something. There is a presumption.

MR. TORRACA: Proof of the presumption --

THE COURT: It is not proof of the presumption.

MR. TORRACA: My clients exercised no dominion or control over the purse that was on the person of the other subject. The statute was intended when a weapon is in a glove compartment or in the car itself but not on the person --

THE COURT: I am aware of what the statute was intended for, but there seems to be a question in my mind whether or not "on the person" means a purse; not in the physical control or possession, you know.

MR. TORRACA: Well, possession could be in your belt; it could be in your pocket; but when it is in a purse or portfolio --

THE COURT: On that basis I will deny your motion. (trial transcript at 548-56). (This portion of the trial transcript is set forth in appellee's separate appendix as A).

presumption, omitted any reference to the "on-the-person" exception.[6]

After the verdict, petitioners moved to set aside the verdict, again on the ground that since the statutory presumption could not properly apply to them, there was insufficient evidence to sustain the jury's verdict. The trial court also denied this motion.[6a]

B. THE STATE APPEALS

The state appellate courts affirmed petitioners' convictions over strongly worded dissents. In petitioners' brief to the New York Appellate Division, Third Department,[7] the petitioners raised a series of related arguments going to the impropriety of the statutory presumption and the insufficiency of evidence to sustain their convictions. Thus, they argued (1) that the facts here brought petitioners within the "on-the-person" exception to the statutory presumption (appellants' brief to the Appellate Division : Third Department, at 21-23); (2) that the presumption was unconstitutional as applied in this case (Id. at 23-24) and (3) that the evidence presented at trial was "totally insufficient to sustain the conviction" (Id. at 24-25). They also preserved the is-

6. The Court's charge on the presumption was as follows:

> (743) Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.
>
> In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

This portion of the charge is set forth in appellants' appendix at A55.

7. This brief is set forth in appellant's appendix to this Court at A99.

6a. A copy of this motion is set forth in appellees' separate appendix as C.

sue, already decided adversely by the state's highest court, that the presumption was unconstitutional on its face (Id. at 23).

The majority in the appellate division affirmed without opinion. The dissenters found that where, as here, the guns were found in a pocketbook belonging to one of the car's occupants, the on-the-person exception to the presumption is "clearly applicable." They further held that in such circumstances "there would be no proper basis for assuming that others in the presence of such a pocketbook would have reason to know its contents." People v. Lemmons, 49 A.D. 2d 639 (set forth in appellant's appendix to this Court at A17). Petitioners thereafter raised the same issues in their brief to the New York Court of Appeals.[8] The majority opinion in the Court of Appeals held that the trial court did not err in denying the motion which petitioners made at the end of the State's case to dismiss for insufficient evidence. According to the majority, the presumption, if applied, would render the State's case sufficient to sustain a conviction, and it was up to the jury to determine whether the presumption was applicable. In considering petitioners' challenges to the constitutionality of the presumption, the majority failed to determine whether the presumption of possession rationally flowed from the presence of the guns in Doe's handbag. Rather, it stated merely that the presumption was valid because of the "difficulty" of proving possession of guns found in automobiles and the need to facilitate prosecutions for the possession of such weapons. The majority also noted that although the presumption

8. This brief is set forth in appellant's appendix to this Court at A84.

establishes a prima facie case against a defendant, he could rebut that presumption by offering evidence that he in fact did not possess the weapon.

The dissent in the Court of Appeals, applying the established test for judging the constitutionality of a statutory presumption, held that the presumption in this case was unconstitutional as applied:

> Here the weapon was found in a woman's handbag which was located within her natural and easy reach and defendant Doe, who was the only woman in the vehicle, expressly admitted that it was her possession. An inference that all the occupants possessed these weapons hardly follows, naturally and rationally, from these circumstances.

Noting the "due process requirements" to which such presumptions are subject, the dissent concluded that "convictions for possession of weapons simply cannot stand solely on the strength of a presumption where the fact presumed i.e., physical or constructive possession, does not flow rationally from the evidence presented." Finally, the dissent noted that nothing precluded the State from proving the charges in conventional fashion - that is, by presenting sufficient evidence, in addition to the proof as to the presence of the weapons in the vehicle, to permit the jury to infer that one or more of the petitioners were in constructive possession of those weapons.

C. THE FEDERAL COURT PROCEEDINGS

Petitioners next filed an application pursuant to 28 U.S.C. §2254 in the District Court for the Southern District of New York. In its application, petitioners argued, inter alia, (1) that the "on-the-person" exception to the statutory presumption rendered it inapplicable to the petitioners, (2) that the presumption was unconstitutional on its face,

(3) that it was unconstitutional as applied in this case, (4) that the trial court's charge was constitutionally deficient because of the omission of any reference to the "on-the-person" exception to the presumption, and (5) that petitioners were convicted on less than proof beyond a reasonable doubt.

The District Court, in granting petitioners' application, found the presumption unconstitutional as applied because the inference that petitioners all possessed the guns did not naturally flow from the mere discovery of those guns in Doe's handbag. Consequently, the trial court erred in failing to grant petitioners' motion to dismiss the charges at the conclusion of the State's case.[9]

This appeal is from the District Court's decision.

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9. Because of its disposition, the district court found it necessary to determine whether the trial court had committed constitutional error by failing to charge the jury as to the "on-the-person" exception to the statutory presumption. The district court did note, however, that in light of petitioners' repeated arguments as to the inapplicability of the presumption on precisely this ground, their failure to object to this omission in the charge did not constitute a deliberate by-pass of state procedures.

POINT I

THE DISTRICT COURT, APPLYING THE PROPER CONSTITUTIONAL TEST, CORRECTLY DETERMINED THAT THE STATUTORY PRESUMPTION IN NEW YORK PENAL LAW §265.15(3) WAS UNCONSTITUTIONAL AS APPLIED IN THIS CASE

New York Penal Law §265.15(3) provides that under certain circumstances the presence of a firearm in a car is presumptive evidence of its possession by all persons occupying that car. In the present case, application of that presumption produced the anomalous result that all four passengers in a car were convicted of the simultaneous possession of the same two guns, even though the State's only evidence was of possession by only one of those passengers. The three petitioners in this proceeding were all convicted merely because they were riding in the same car as one Jane Doe, in whose handbag both guns were found. That handbag, located between Doe's right leg and the right front car door next to which she was sitting, was out of reach of the other three passengers, and the State introduced no evidence whatsoever to indicate that any of them had ever had actual or constructive possession of either of the guns or that they even knew that the guns existed.

The district court found that petitioners' convictions were constitutionally intolerable. The State in this appeal must therefore establish that the district court's conclusion was plainly erroneous.[10]

10. See, e.g., Woods v. United States, 449 F.2d 740 (5th Cir.1971); United States ex rel. Bruce v. Patterson, 155 F.2d 429 (1st Cir.) cert. denied 329 U.S. 739 (1945); United States ex rel. Sadness v. Wilkins, 312 F.2d 559 (2d Cir.) cert. denied 374 U.S. 849 (1963).

Petitioners submit that the district court reached the only possible conclusion consistent with fundamental concepts of justice and due process.

In reviewing the propriety of the decision below, this Court must consider two principal questions - (1) whether the district court applied the correct test to judge the constitutionality of the presumption, and (2) whether its conclusion was clearly erroneous. Turning to the first issue, it requires no close analysis to conclude that the district court applied the correct test under existing law. As this Court recently held in United States v. Tavoularis, 515 F.2d 1070, 1075 (2d Cir.,1975):

> An inference relied on to establish an element of a crime will be rejected as violative of due process "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

See also United States v. Leary, 395 U.S. 6, 36 (1969); United States v. Gainey, 380 U.S. 63 (1965); United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463 (1943). The same test is applicable whether the inference is embodied in a statutory presumption (see e.g., United States v. Leary, supra) or existing case law (see e.g., United States v. Tavoularis, supra); whether it is being judged on its face (United States v. Leary, supra; United States v. Jones, 418 F.2d 818 (8th Cir.1969)) or as applied (see e.g., United States v. Tavoularis, supra).

The State cannot seriously dispute that the district court properly

recognized and applied this test.[11] In its opinion, the court plainly stated:

> The test for the constitutionality of a presumption has been stated as whether "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." United States v. Leary, 395 U.S. 6, 36 (1969). There must "be a rational connection between the facts proved and the fact presumed," or a "reasonable relationship to the circumstances of life as we know them." Tot v. United States, 319 U.S. 463, 467-68 (1943).
>
> (district court opinion at 5)

As the district court properly concluded, the application of this test to the facts in this case can logically lead to only one conclusion. The guns, the possession of which petitioners were all convicted, were both found in Jane Doe's handbag, which was located between her right leg and the car door next to which she was seated. Items in such containers have traditionally been regarded as being within the possession and dominion of the handbag's owner. As the court below noted, even New York Law recognizes this commonly accepted fact:

> In People v. Pugash, 15 N.Y. 2d 65 (1964), cert. denied, 380 U.S. 936, appeal dismissed, 382 U.S. 20 (1965), the New York Court of Appeals held that a firearm in a briefcase carried by a person was "concealed on his person." A fortiori, a woman's handbag in a car within her reach is her equivalent of a man's various pockets, and normally entitled to privacy. Its contents are, therefore, necessarily "upon her person."
>
> (district court opinion at 4-5)

Moreover, the pocketbook had Doe's papers in it and Doe admitted it was her bag. Petitioner Lemmons was out of the car at the time of the seiz-

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11. Indeed, the State appears to concede, as it must, that the district court applied the proper test (State brief at 7).

ure and petitioners Hardrick and Allen were in the rear seat of the car, away from Doe and the guns. Under these circumstances, any claim that the three petitioners all simultaneously possessed the guns in Doe's pocketbook "would verge on the irrational." United States v. Tavoularis, supra, 515 F.2d at 1075.

Apparently recognizing this fact, the State, in its brief on this appeal, makes little effort to convince this Court that the statutory presumption is rational as applied to the facts in this case. Rather, it concentrates on various jurisdictional arguments, all of which should be rejected by this Court as invalid.

A. The District Court did not substitute its interpretation of state law for that of the State Courts.

The State first argues that the district court improperly substituted its interpretation of state law for that of the state trial and appellate courts. (State brief at 8). The State's principal error in making this argument lies in its mischaracterization of the district court decision as constituting an interpretation "of state law." (State's brief at 7, 8, 11). In so doing, the State attempts to create the impression that the district court somehow improperly intruded into a domain exclusively reserved for the state courts. Such is clearly not the case.

The district court, in granting the habeas corpus application, was not reinterpreting state law. Rather, just as in every habeas corpus proceeding brought by a state prisoner, the district court was reviewing a determination of the state courts on a federal constitutional issue, namely the constitutionality of § 265.15(3) as applied in petitioners'

case.Such review is authorized and indeed mandated by the language of 28 U.S.C. 2254. Moreover, although a district court is expected to give appropriate consideration to the determinations of the state courts, it is in no way bound by them. Rather, it is obliged to make an "independent determination" of the constitutional matter before it. See, e.g., United States ex rel. Preston v. Mancusi, 422 F.2d 940, (2d Cir.,1970). Where, as here, the district court concludes that the habeas application must be granted, it is obliged to "substitute" its judgment for that of the state courts on the constitutional issue.

The State's expression of indignation that the district court should exercise such authority is particularly inappropriate here, since the state courts in this case abdicated their responsibilities by failing to apply the proper test for judging the constitutionality of the statutory presumption in question. Although the "more likely than not" test of United States v. Leary, supra, was raised by petitioners before both the Appellate Division, Third Department[12] and the New York Court of Appeals,[13] neither court saw fit to apply it, or indeed to even explain why they chose not to apply it. Thus, the New York Court of Appeals

12. See appellant's brief to the Appellate Division at 23, as set forth in appellant's appendix to this Court at A121.
13. See appellant's brief to the New York Court of Appeals at 20, as set forth in appellant's appendix to this Court at A96.

in affirming petitioners' convictions, omitted any mention of the Leary test. Rather, it focused on the "difficulties" encountered in prosecuting cases of weapons found in cars, and the need for the statutory presumption so as to "require the occupants of an automobile to explain the presence of the firearm ..." (Court of Appeals opinion at 5). In so holding, the Court appears to have resurrected, perhaps unwittingly, the test for presumptions which was articulated in certain early cases - whether it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact. See e.g., Morrison v. California, 291 U.S. 82 (1934).[13a] That test was "reduced to the status of a 'corollary'" in Tot v. United States, supra, and finally disregarded altogether in Leary in favor of the "more likely than not" test. United States v. Leary, supra, 395 U.S. at 34-36. Thus, for the New York Court of Appeals to apply that test in this case was clearly erroneous.

In the final analysis, the State's first argument appears to result from a misreading of the district court's opinion. Latching onto the district court's discussion of the "upon the person" exception to the statutory presumption, (District Court opinion at 4-5) the State concludes that the district court must be basing its decision on a reinterpretation of that phrase in the statute. Any reasonable reading of the district court's opinion, however, establishes that the district court based its decision on the application of the Leary test of constitutionality. The "upon the person" exception was discussed by the district court only as a supplemental matter, "in addition" to, or rather in support of, the court's conclusion under the Leary test. Thus, the

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13a - It should be noted that Morrison was decided just two years before New York State adopted the statutory presumption in question.

district court was not "substituting its interpretation of state law," as the State argues, but rather was fulfilling its mandated responsibility to evaluate a claim by state prisoners that they had been denied their rights under the Federal Constitution.

B. The District Court did not improperly rule on the sufficiency of the evidence.

The State's second argument - that the district court improperly ruled on the sufficiency of the evidence - attempts to bring this case within that line of precedents holding that insufficiency of the evidence is not cognizable in federal habeas corpus proceedings unless it rises to the level of a constitutional deprivation. (State brief at 14).

The State is wrong both in its articulation of the test for constitutional insufficiency of the evidence and in its application of that test to this proceeding. Tracking the language of certain older cases, the State asserts that insufficiency does not rise to the level of a constitutional violation unless the record is totally devoid of evidentiary support for the conviction (State brief at 14). That test has now been rejected in favor of the less stringent standard that

> ...a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged ... violate[s] due process.
> Vachon v. New Hampshire, 414 U.S. 478, 480 (1974) (emphasis added)

See also United States v. Travers, 514 F.2d 1171, 1176 (2d Cir.1974).

The test for constitutional insufficiency is relevant to this proceeding only by analogy. We are dealing here not with a question of insufficiency, but rather with the question of whether a presumption is constitutional as applied.[14] The distinction between these two tests

14. The fact that such a determination necessarily involves a subjective evaluation of the evidence does not turn this into a sufficiency issue. Such a subjective evaluation is mandated every time the constitutionality of a presumption is challenged. See e.g., United States v. Leary, supra; Tot v. United States, supra; United States v. Tavoularis, supra.

rests in the quantum of evidence necessary to defeat the claim of unconstitutionality. A conviction is constitutionally void for insufficiency only if the prosecution fails to introduce any evidence as to at least one element of the crime. Under the Leary test for presumptions, however, even if the State has introduced some evidence of an element of the crime, it may not rely on a statutory presumption to provide the missing remainder of that element unless the presumed evidence is "more likely than not" to flow from the proven facts.

Practically speaking, however, this distinction is of little significance. In the present case, the State introduced evidence of the defendant's presence in the car and of the guns' presence in Doe's purse. It then relied on the statutory presumption to provide the element of possession which was requisite to conviction on the crimes charged. Whether the evidence of defendants' presence in the car and the guns' presence in Doe's purse is seen by this Court as "some" evidence of defendants' possession of the guns, or as having no significant value on the question of possession, is unimportant. What is dispositive is that the conclusion that petitioners all possessed the guns in Doe's purse is not rendered "more likely than not" merely because petitioners were in the same car as that purse. This is precisely what the district court concluded in finding the presumption unconstitutional as applied here.

C. The basis for the District Court's ruling was the unconstitutionality of the statutory presumption as applied in this case.

The state's third argument is that the district court's decision is based on a finding of "mere error in the conduct" of the trial.

(State's brief at 16-19). Focusing on the district court's statement that the trial court erred in failing to dismiss the charges at the close of the State's case, the State attempts to bring the district court's decision within that line of cases holding that certain procedural errors in the conduct of a trial are not of constitutional dimension. In so doing, the State once again misconstrues the actual holding of the court below.

The basis of the district court's decision is its finding that the statutory presumption of possession which formed the basis for petitioners' convictions was unconstitutional as applied in this case. Since the statutory presumption could not be applied, and since the State presented no actual evidence of possession at trial, it became evident at the close of the State's case that the jury could not render a guilty verdict which would withstand constitutional scrutiny. Consequently, the trial court erred in failing to grant petitioners' motion to dismiss the charges at the close of the State's case. Its failure to do so resulted in a conviction based on an unconstitutionally applied presumption, which the district court properly set aside.

D. Petitioners did not waive the issue of the unconstitutionality of the presumption as applied here by failing to object to the judge's charge.

Although it does not directly confront the issue, the State seems to suggest that petitioners somehow waived the issue of the unconstitutionality of the presumption as applied here by failing to object to the judge's omission of the "upon the person" exception when he charged the jury concerning the presumption (State's brief at 16). That suggestion

stems from the State's apparent confusion as to the issues in this case and the strict court's disposition of those issues.

The prior proceedings in this case have dealt, inter alia, with three related issues - (1) whether the statutory presumption in question is constitutional, (2) whether petitioners come within the "upon the person" exception to the presumption, and (3) whether the trial judge erred in failing to charge the jury as to the "upon the person" exception. The State treats the three issues as synonymous and then argues that since petitioners failed to object to the omission in the judge's charge (the third issue) they somehow waived the separate and broader issue of the presumption's constitutionality (the first issue). The State's argument is clearly invalid.

Petitioners expressly challenged the validity of the presumption at trial in both their motion to dismiss at the end of the State's case and their subsequent motion to set aside the verdict.[15] On appeal, they urged both the Appellate Division and the New York Court of Appeals to apply the Leary test to judge the constitutionality of this presumption as applied in this case.

The federal district court finally did apply the Leary test and concluded that the presumption was unconstitutional as applied (District Court opinion at 4). In so doing, it took note of, but did not decide, the separate issue (listed as #3 above) of whether the omission

15. Petitioners' motion to set aside the verdict is set forth in appellees' separate appendix to this Court as C. The portion of that motion alleging the unconstitutionality of the statutory presumption is at page 3 of the memorandum of law attached to that motion.

in the charge was also a constitutional violation.[16] (District Court opinion at 3, n.7). (It did state, however, that petitioners' failure to object to that omission was not a deliberate by-pass (Id.)). Consequently, petitioners' failure to object to the separate issue of the omission of the "upon the person" exception in the judge's charge is irrelevant to the issue of the presumption's unconstitutionality on which the district court decided petitioners' application.[17]

16. After finding the presumption unconstitutional as applied, the district court also made mention of the third issue (listed as #2 above - whether the "upon the person" exception applied to petitioners), indicating that the fact that the statute itself recognized such an exception provided support for the Court's finding that the application of the presumption in this case was unconstitutional. The fact that the presumption recognized such an exception was, however, only one of the factors which the district court considered in judging the constitutionality of the presumption in this case. Other considerations logically included the location of the purse on the floor between Doe's right leg and the car door where only she could easily reach it; the presence of Doe's papers in the purse and her admission that the purse was hers; the fact that two of the petitioners were in the back seat, out of sight or reach of the purse, and the third was driving; and the absence of any actual proof of possession by any of the petitioners. Thus, the district court denominated its discussion of the "upon the person" exception a merely supplemental consideration (district court opinion at 4).

17. It is also worth noting that, since the presumption could not constitutionally be applied in this case, and since there was no other evidence of possession, even a properly instructed jury could not have rendered a constitutionally valid verdict of guilty. Thus, petitioners' failure to object to the omission in the judge's charge had no legal or practical effect on the issue of the presumption's constitutionality.

E. The "beyond a reasonable doubt" test.

Petitioners submit that the statutory presumption is unconstitutional as applied under the "more likely than not" test of Leary. If this Court concludes that the presumption satisfies that test, however, it should remand the case for further briefing and consideration to determine whether the presumption as applied also meets the more stringent "beyond a reasonable doubt" test. In re Winship, 397 U.S. 6, 36 (1969). Whether this test is applicable to all inferences is still to be decided (Barnes v. United States, 412 U.S. 837, 841-46 (1973); Turner v. United States, 396 U.S. 398, 416, 419 (1970); Leary v. United States, supra, 395 U.S. at 36 n.64; United States v. Tavoularis, supra, 515 F.2d at 1075 n.10) although this Court has previously held it applicable to cases such as this which involve statutory presumptions. United States v. Coppola, 424 F.2d 991, 993 (2d Cir.) cert. denied, 399 U.S. 928 (1970). Unless the evidence at trial is sufficient to enable a rational juror to find the inferred fact beyond a reasonable doubt, he cannot properly render a guilty verdict in accordance with that standard. See e.g., In re Winship, supra; Barnes v. United States, supra, 412 U. S. at 843.

The application of this test in this proceeding is particularly

appropriate, given the repeated suggestions of the State courts and the Attorney General's office that the petitioners can properly be required to prove their exemption from the presumption or else face conviction based on it. (See e.g., the New York Court of Appeals opinion at 5-6; State's brief to this Court at 5, 16, 21, 22). This dilution and shifting of the burden of proof is clearly unconstitutional. See e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975); cf. Leary v. United States, supra, 395 U.S. at 34-37. Petitioners respectfully submit that there is no rational way by which the evidence in this case would support an inference of possession beyond a reasonable doubt.

In conclusion, it is apparent that the district court's judgment should be affirmed. Applying the currently accepted test, it reached the only logical conclusion. A statutory presumption cannot serve, as it did here, as a substitute for the State's burden to prove every element of the crime charged. Nor can it be upheld, as the state courts upheld this presumption, merely because it facilitates prosecutions and helps the State to overcome difficulties in meeting its burden of proof. In the final analysis, a statutory presumption should do "no more that 'accord to the evidence, if unexplained, its natural probative force.'" Leary v. United States, supra, 395 U.S. at 35; United States v. Gainey, supra, 380 U.S. at 71. In the context of this case, the statutory presumption in question went much further, providing an unnatural inference of possession based on mere presence. Convictions obtained in such manner cannot be permitted to stand.

POINT II

THE PRESUMPTION CONTAINED IN §265.15(3) IS UNCONSTITUTIONAL ON ITS FACE.

In the district court, petitioners argued that the presumption in question was unconstitutional on its face as well as in its application in this case. Since the district court found the presumption unconstitutional as applied, it did not address the question of whether it was unconstitutional on its face. The State, in its appeal to this Court, however, devotes Point II of its brief to an argument as to why the presumption is constitutional on its face.

Petitioners are at a loss to understand why the State raises this issue here. If this Court affirms the district court's judgment that the presumption is unconstitutional as applied, then like the district court, this Court will have no reason to address the broader issue of whether the presumption is unconstitutional on its face. If on the other hand, this Court rejects the district court's decision and finds the presumption constitutional as applied, then it would necessarily be implicit in that finding that the presumption is constitutional on its face.

Since there is thus no conceivable reason for this Court to address this issue, petitioners will not brief it here. The Court's attention is directed, however, to petitioners' memorandum of law in the district court, (Appellee's separate appendix at B) which contains a full response to the arguments which the State raises on this issue.

POINT III

THE TRIAL COURT COMMITTED ERROR OF CONSTITUTIONAL DIMENSION IN FAILING TO CHARGE THE JURY AS TO THE "UPON THE PERSON EXCEPTION TO THE STATUTORY PRESUMPTION.

Since the district court held the statutory presumption unconstitutional as applied and vacated petitioners' convictions on that basis, it found it unnecessary to reach another issue raised by petitioners - whether the trial court also committed constitutional error by failing to charge the jury as to the "upon the person" exception to the presumption (see petitioners' memorandum of law to the district court at 13).[18] If this Court finds that the district court erred in holding the presumption unconstitutional as applied, it must then address this issue.

At the end of the State's case, petitioners' counsel argued at length that since the statutory presumption could not apply to them, there was no evidence on which a conviction could be based and the charges should therefore be dismissed.[19] As part of this motion, petitioners argued that the charges could not be sustained because the evidence showed that they came within the "upon the person" exception to the statutory presumption. The trial court denied the motion and,

18. This memorandum of law is set forth in appellee's separate appendix to this Court as C.
19. This section of the trial transcript is set forth in appellee's separate appendix to this Court as A.

in thereafter charging the jury, failed to make any mention of the "upon the person" exception. Petitioners failed to object to this omission, but did raise the claim that they came within the "upon the person" exception before both of the State Appellate Courts.[20] The New York Court of Appeals noted the omission in the judge's charge, but ruled that petitioners had waived the issue by failing to object to it.

The district court did not reach the issue of whether this omission was error of constitutional dimension. It did, however, note that in view of petitioners' repeated arguments concerning the "upon the person" exception, there had been no deliberate by-pass of state procedures as to this issue (District Court opinion at 3 n.7).

Petitioners submit that there was no by-pass and further, that the omission in the charge is an issue of constitutional dimension requiring that petitioners' convictions be vacated.

A deliberate by-pass has been defined by this Court as "a strategic decision by appellant's counsel not to object..." United States ex rel. Schaedel v. Follette, 447 F.2d 1297, 1300 (2d Cir.,1971); See also Henry v. Mississippi, 379 U.S. 443 (1965); United States ex rel. Agron v. Herold, 426 F.2d 125 (2d Cir.1970). As the district court correctly

20. See appellants' brief to the New York Appellate Division, Third Department at 21; set forth in appellant's separate appendix to this Court at A119. See also, appellant's brief to the New York Court of Appeals at 18; set forth in appellant's separate appendix to this Court at A95.

noted, a finding of deliberate by-pass is impossible here, given the repeated efforts of counsel to raise this issue in closely related context in the state courts (District Court opinion at 3 n.7).

Petitioners also submit that the omission of the "upon the person" exception from the jury charge was error of constitutional dimension. It is beyond dispute that inherent in a defendant's constitutional rights to a jury trial, a fair trial and due process is the right to have a jury find proof of every element of the crime charged beyond a reasonable doubt before it can return a guilty verdict on that charge. See e.g., In re Winship, supra, 397 U.S. at 364; United States v. Screws, 325 U.S. 91, 107 (1945); United States v. Hayward, 420 F.2d 142 (D.C. Cir.,1969). In the present case, therefore, the jury was obliged to find proof of possession beyond a reasonable doubt before they could convict petitioners of the gun possession charges. Rather than being instructed to do so, however, they were advised that they could convict on the basis of the statutory presumption merely if they found that petitioners were riding in the same car in which the guns were found. Moreover, they were never advised that they could not rely on that presumption as proof of possession if the guns were found "upon the person" of any of the car's passengers.

The critical difference between this case and Henderson v. Kibbe, 97 S.Ct. 1730 (1977) is that in Kibbe the evidence in the record was "plainly sufficient to prove [all elements of the crime charged] beyond a reasonable doubt" and it was obvious from the record that the jury made such a finding. (Id. at 1736). Here, the record contained no such

evidence; rather, the State has repeatedly conceded that the only basis for the conviction was the statutory presumption. (See e.g., District Court opinion at 3). Since the jury was never even instructed as to the limits on the applicability of that presumption, the convictions were constitutionally defective.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellees
401 Broadway Suite 306
New York, N. Y. 10013
212/925-2105

MICHAEL YOUNG, ESQ.
Of Counsel

Affidavit of Service by Mail

State of New York
County of New York

BERNARD GRAU being sworn, says:
I am not a party to this action; I am over 18 years of age; I reside at 401 BROADWAY - N.Y.C. 10013

ON August 26, 1977 I served the within Brief and appendix upon the New York State Atty. General c/o Ms. Eileen Shapiro, Esq. the attorney(s) for the State of New York in this action, at 2 World TRADE Center, N.Y.C. 10047

Bernard Grau
BERNARD GRAU

SWORN to before me
August 26, 1977

JEROME E. GOLDMAN
Notary Public, State of New York
No. 30-6571240, Nassau County
Certificate filed in New York County
Commission Expires March 30, 19 78